IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 26TH MARCH 2007 / 5TH CHAITHRA 1929

CRL.A.No. 2067 of 2006()

SC.871/2001 of ADDL.SESSIONS COURT-TRIAL OF ABKARI ACT CASES,NEYYATTINKARA
CP.354/2000 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II,NEYYATTINKARA

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APPELLANT: ACCUSED NO.2

VIJAYAKUMAR, S/O. KRISHNA PANICKER,
POTTAKUZHY VEEDU, ARAYOOR DESOM,
CHENKAL VILLAGE.

BY ADV. SRI.T.A.UNNIKRISHNAN
SMT.RESHMI POULOSE

RESPONDENTS: COMPLAINANT

THE STATE OF KERALA, REP. BY
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. K.S SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26/03/2007, ALONG WITH CRA NO. 2301 OF 2006 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. Appeal No. 2301 of 2006

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Crl.Appeal No. 2067 of 2006

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Dated, 26th day of March 2007

JUDGMENT

In these appeals, one preferred through private counsel and another preferred from the Central Prison, Thiruvananthapuram, accused Nos. 2 and 1 respectively in S.C. 871/01 on the file of the Addl. Sessions Court for Trial of Abkari Cases, Neyyattinkara, challenge the conviction entered and the sentence passed against them by that court for an offence punishable under Sec. 58 of the Abkari Act.

2. The case of prosecution can be summarised as follows:

P.W.6, the Sub Inspector of Parassala Police Station, while on patrol duty on 26-8-1998 received reliable information to the effect that illicit arrack was sold by one Parameswaran from in front of Pottakkuzhi house. When the police party headed by P.W.6 reached the said place at about 11.30 a.m. on that day in Arayoor Desom of Chenkal village , they came across the first accused standing in the front of the courtyard of the said house

underneath a coconut tree carrying a white jerry can having a capacity of 10 litres and a glass tumbler. On examining the contents of the jerry can through smell and taste it was found to be illicit arrack. The interrogation of the first accused resulted in his revealing that the contraband liquor was given to him for sale by one Vijayakumar to whom one Pakkutta Panicker was the supplier . Based on the information disclosed by the first accused the police party recovered two empty cans each of 35 litres capacity, another 10 litre jerry can filled with illicit arrack, a steel vessel having a capacity of 2 litres containing 200 ml of illicit arrack and a steel glass tumbler of 100 ml. capacity all kept concealed beneath a hay-rick. The first accused was apprehended from the spot itself and the contraband articles were seized by P.W.6 under Ext.P1 mahazar. Currency notes worth Rs. 270/- being the sale proceeds of arrack were also seized from the first accused. Since the property from where the contraband articles were seized belonged to the 2nd accused he was arrayed as such and Pakkutta Panicker was arrayed as the 3rd accused in the F.I.R. lodged before the J.F.C.M. II, Neyyattinkara. During the course of investigation, the name of Pakkutta Panicker was deleted and one Babu Raj was arrayed as

A3. Subsequently as per the direction of the South Zone Inspector General of Police and allowed by the committal court , the Dy. S.P. (Rural) , Crime Records Bureau re-investigated the case and filed charge-sheet against A1, A2 and Vijayakumari (the wife of A2) shown as A3 in the place of Babu Raj. The three accused persons have thus committed offences punishable under Sec. 58 of the Abkari Act.

3. On the accused persons pleading not guilty to the charge framed against them by the court below for the aforementioned offences, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 10 witnesses as P.W.s 1 to 10 and got marked 14 documents as Exts. P1 to P14 and 5 material objects as Mos 1 and 5.

4. After the close of the prosecution evidence, the accused were questioned under Sec. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against them in the evidence for the prosecution. They denied those circumstances and maintained their innocence.

5. Since the court below did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C. the

accused were, therefore, called upon to enter on their defence and to adduce any evidence which they might have in support thereof. They did not adduce any defence evidence.

6. The learned Addl. Sessions Judge, after trial, as per judgment dated 11-10-2006 acquitted the 3rd accused Vijaya Kumari but convicted accused nos. 1 and 2 for the above said offence. For the conviction under Sec. 58 of the Abkari Act the first accused was sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1,00,000/- and on default to pay the fine, to suffer rigorous imprisonment for six months. The second accused was sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs. 1,00,000/- and on default to pay the fine, to suffer rigorous imprisonment for six months. It is the said judgment which is assailed in these appeals.

7. I heard Advocate Sri. K.K. Rajeev the learned counsel who defended the first accused on State Brief and Advocate Sri. T.A. Unnikrishnan, the learned Counsel who argued the appeal filed by the 2nd accused. I also heard Adv. Sri. K. S. Sivakumar, the learned Public Prosecutor who defended the State.

8. The only point which arises for consideration is as to whether the conviction entered and the sentence passed against the appellants are sustainable or not ?

THE POINT:-

9. P.W.1 was one of the attestors of Ext.P1 seizure mahazar. Eventhough he admitted his signature in Ext.P1, he turned hostile to the prosecution. P.Ws 2 to 4 are the alleged eye-witnesses to the occurrence. P.Ws 2 and 4 also turned disloyal to the prosecution. P.W.4 deposed before Court as if he did not have any direct knowledge about the occurrence and his knowledge about the occurrence was only hearsay. P.W. 5 is the Assistant Sub Inspector of Parassala Police Station. He accompanied P.W.6, the detecting officer. P.W.6 is the Sub Inspector of Police, Parassala, who detected the offence. P.W.7 who was the Circle Inspector laid the charge-sheet after completing the investigation. He had arrested the 2nd accused on 24-2-1994. P.W.8 is the Secretary of Chenkal Grama Panchayath. He p;roved Ext.P9 photostat copy of the building tax etc. to show that the building situated in the property from where the contraband articles were recovered stands assessed in the name of the 2nd accused. P.W.10 was the thondi section clerk cited by

the prosecution to prove the receipt of the properties and the sampling therefrom.

10. After hearing both sides at length, and after a careful consideration of the oral and documentary evidence, I am not satisfied that the prosecution has established the guilt of accused Nos. 1 and 2 beyond reasonable doubt. Even if the evidence of P.Ws 5 and 6 could be accepted to conclude that the jerry cans , glass tumblers and steel vessel etc. were seized as alleged by the prosecution and that A1 was found in possession of one of the jerry cans filled with the liquid alleged to be arrack, the prosecution can succeed only if it is shown that a sample taken from the jerry can allegedly seized from the first accused and which allegedly contained the contraband arrack was, on analysis, confirmed to be illicit arrack. Similarly, merely because the 2nd accused is shown to be the owner of the accused as per the building tax assessment, it cannot be concluded that he is the owner of the land where the hayrick beneath which the rest of the contraband articles were seized, is situated. The search and seizure in this case were allegedly made on 26-8-1998. Item No. I of the property list consists of two jerry cans each of 10 litres capacity filled with the liquid allegedly arrack. Even according

to the prosecution, the first accused was found in actual possession of only one jerry can of 10 litres capacity filled with the above liquid and the other jerry can of equal capacity was recovered from beneath the hayrick in the landed property. It has not been identified as to which of the two cans was actually held by the first accused. No doubt, Ext.P6 certificate of chemical analysis shows that the two samples were containing 34.64 and 29.87 percent by volume of Ethyl Alcohol respectively. But then what P.W.10 the thondi section clerk would depose is that he was the person who received the properties mentioned in Ext.P3 property list and it was he who entered the same in the property register. The certified photostat copy of page 142 of the thondi register was marked as Ext.P14. P.W.10 would further deposed that he did the sampling in this case on the strength of orders passed by the Magistrate and that Ext.P14 contains the endorsement showing the entrustment of the samples for despatch to the Chemical Examiner. No doubt, Ext.P14 shows that somebody had received the samples. But then, neither Ext.P3 property list nor Ext. P14 property register contains any endorsement by the Magistrate directing the drawing of sample from the properties produced in this case. On the contrary, the

only endorsement on Exts.P3 and P14 is that the property should be entrusted with the Parassala police until further orders. If on 27-8-1998, the properties had been promptly entrusted with the police for safe custody, one fails to understand as to how a sample could be drawn from them. This is particularly so since there is no endorsement of the Magistrate to the effect that the bulk quantity should be entrusted to the police **after taking sample.** P.W.10 does not mention the date on which he drew the sample. Likewise, P.W.10 is silent about the quantity of sample taken by him. The further record which the prosecution relies on is the certificate of chemical analysis which refers to the date of the covering letter of the Magistrate indicating that the samples were dispatched on 17-6-1999. If the properties reached the court on 27-8-1998, it is not known as to why the samples were dispatched only on 17-6-1999 and who drew the samples and on what date and what was the quantity drawn and whether they were dispatched in a tamper proof condition. In a case of this nature the prosecution can succeed in securing conviction only if it proves that the samples which was analysed under Ext.P6 certificate of chemical analysis were the very same samples which were drawn from the bulk quantity of contraband

liquid produced in court and which had changed several hands before reaching the hands of the chemical examiner . It is for want of this link evidence that the prosecution has to fail. The law is well settled that unless the prosecution proves that the sample which was analysed by the chemical examiner was the very same sample which was drawn from the contraband liquid alleged possessed by the accused, no conviction could legitimately be recorded against the accused. ***(Vide The State of Rajasthan v. Daulat Ram - AIR 1980 SC 1314 and Valsala v. State of Kerala - 1993 (2) KLT 550).***

11. The case of the 2nd accused as already stated, was not arrested from the spot nor has it been proved that the property from where the contraband articles were seized belongs to the 2nd accused. The mere fact that the 2nd accused is the owner of the building situated in a portion of the said property cannot take the prosecution any further. P.W.9 has admitted that he did not examine the revenue records to ascertain the ownership over the land in question. If so, it cannot be concluded that the 2nd accused was the owner of the land where the contraband materials were found.

12. The result of the foregoing discussion is that the

conviction entered and the sentence passed against the appellants by the learned Addl. Sessions Judge overlooking the above vital aspects of the matter cannot therefore, be sustained and are accordingly, dislodged.

13. The appellants are found not guilty of the offence punishable under Sec. 58 of the Abkari Act and are acquitted thereunder. They are set at liberty. They shall be released from prison forthwith unless their continued detention is needed in connection with any other case.

In the result, these Criminal Appeals are allowed as above.

V. RAMKUMAR, JUDGE.

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V. RAMKUMAR, J.

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Crl. Appeal No. 2301 of 2006

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Crl.Appeal No. 2067 of 2006

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Dated, 26th day of March 2007

JUDGMENT